

on LinkedIn. There is no evidence whatsoever to suggest that T.M. attempted to influence F.M.'s testimony. Instead, T.M. asked F.M. what, if anything, he knew about the status of T.M.'s lost funds.

Moreover, it is clear both from F.M.'s text messages and from his previous interviews with the government that his testimony will, in no way, exculpate the defendant as to the charged crimes. Indeed, F.M. acknowledged that he has not spoken to either the defendant or Armando Almirall in three or four years. Given that he did not speak to either the defendant or Mr. Almirall during the entirety of the alleged fraud, it is difficult to surmise how any testimony he offers in this case will be germane to the material questions on which the jury will need to determine the defendant's guilt. Nor is it clear how these communications would have any impact on his testimony given that F.M.'s truthful testimony would be that he was, in no way, involved with AURA's deals as it related to C.B. and T.M. (and R.F.) F.M. has no firsthand knowledge of the alleged fraud. There is no danger here that F.M.'s truthful testimony will be adversely impacted by the messages. Indeed, to the extent he will testify about his knowledge of AURA prior to the occurrence of the alleged schemes, such testimony will in no way be connected to T.M. and C.B. Simply put, T.M.'s communication with F.M. do not provide a sufficient basis to grant a mistrial.

With respect to the defendant's own testimony, given that the messages he has provided the Court occurred months ago, it is difficult to surmise how those messages would have any impact on his testimony. From the outset of the trial, it was clear that the defendant intended to testify. And given that he did not inform his counsel of these messages until today, the existence of these messages clearly did not have any impact on his decision to testify or on his state of mind. Nor will they have any impact on his decision to testify going forward.

Importantly, T.M. is not the only witness who testified to the scheme to defraud as it relates to the Boston television series. His testimony is consistent with and corroborated by witness C.B.'s independent recollection of the fraud. Indeed, witness C.B. had an even more direct role with respect to approval of AURA's wire requests as he was tasked with approving the wire requests, not T.M.

II. Analysis

"The denial of a defendant's motion for a mistrial is within the sound discretion of the district court and will be disturbed only under the most extraordinary circumstances." *United States v. Recio*, 884 F.2d 230, 239 (4th Cir. 2018) (quoting *United States v. Dorlouis*, 107 F.3d 248, 257 (4th Cir. 1997)). "Before granting a mistrial, the court should always consider whether the giving of a curative instruction or some alternative less drastic than mistrial is appropriate." *United States v. Martin*, 756 F.2d 323, 328 (4th Cir. 1985). A grant of a mistrial would only be appropriate when "the circumstances indicate a manifest necessity to discharge the jury to avoid defeating the ends of justice." *Dorlouis*, 107 F.3d at 257. In order for the grant of mistrial to be appropriate, the Court must determine that there exists some serious procedural error or misconduct that would result in an unfair trial. *Williamson v. United States*, 512 U.S. 594, 610 (1994).

Generally, the Court must consider "the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects on the error." *United States v. Nyman*, 649 F.2d 208, 213 (4th Cir. 1980) (internal citations omitted). The defendant's motion presents a slightly different issue given that no "error," such as inadmissible testimony, or inappropriate commentary, has occurred. The witness at issue has previously been questioned

and vociferously cross-examined by counsel for the defendant. What is more, it is clear that both F.M. and the defendant will still be able to testify without impact from T.M.'s comments.

The United States does not condone T.M.'s actions. In fact, as soon as counsel for the defendant notified the government of the existence of these text messages, counsel for the United States instructed law enforcement to inform T.M. not to communicate with any individuals associated with AURA.¹ T.M. indicated that he understood and apologized for his actions. And while there is no justification for T.M.'s actions, they do not rise to the level of some serious procedural error or misconduct that would result in an unfair trial to the defendant.

There is no evidence in the record that meets the high standard for declaring a mistrial. Further, there is presently no danger that T.M.'s actions will in some way prevent the jury from appropriately discharging its duties in this case. Absent a showing of an actual impact on the sanctity of the trial and of prejudice to the defendant, the Court should summarily deny the defendant's motion. No such impact has been or can be demonstrated. Accordingly, the United States respectfully requests that the Court deny the defendant's motion for a mistrial.

¹ While the United States does not condone T.M.'s actions, it is perhaps hyperbole to refer to the messages to F.M. as threats in the context of attempting to intimidate a witness at trial. That is especially true in light of the fact that it does not appear that T.M. was even aware that F.M. has been subpoenaed to testify.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

_____/s/
Jamar K. Walker
Assistant United States Attorney